UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 7

UNITED STATES POSTAL SERVICE,	)	
	)	
Respondent	)	
	)	
and	)	Case 14-CA-195011
	)	
	)	
ROY YOUNG, an Individual	)	
	)	
Charging Party	)	

RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND SUPPORTING BRIEF

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Respondent, United States Postal Service ("Postal Service"), pursuant to Section 102.46 of the Board's Rules and Regulations, hereby timely submits its exceptions to the Administrative Law Judge's (ALJ's) decision, issued on September 25, 2018. Respondent incorporates its supporting brief, including the citation of authorities, with its exceptions herein. Respondent files exceptions with respect to the following rulings made by the ALJ.

1. The ALJ erred when she held that Mr. Young was engaged in concerted protected activity on February 8, 2017, and February 10, 2017

The ALJ's ruling is set forth at pages 20 [line 7] through 23 [line 24] of the decision.

First and foremost, the ALJ relied upon Fresh & Easy Neighborhood Market, 361 NLRB 151 (2014), in reaching her decision. In one place, the ALJ stated that Fresh & Easy "clarified the proper analysis for determining whether activity is concerted." ALJ Decision at p. 21 [lines 8-10]. The ALJ later stated that "[t]he analysis focuses on whether there is a link between employee activity and matters concerning the workplace or employees' interests as employees." ALJ Decision at p. 21 [lines 32-34]. In Fresh & Easy, the Board held that the charging party was engaged in concerted activity when she asked three co-workers to sign a statement, attesting to something that had been written on a white board which the charging party found offensive. In doing so, the Board overturned its prior decision in Holling Press, Inc., 343 NLRB 301 (2004), which held activity is not concerted where the "goal was a purely individual one. In addition, there is no evidence that any other employee had similar problems – real or perceived – with a coworker or supervisor." Respondent now respectfully asks the Board to

overturn Fresh & Easy and to return to the standard previously enunciated in Holling Press, Inc. or to apply a new standard.

Specifically, the Board's majority in Fresh & Easy abandoned years of court and Board authority. In Alleluia Cushion Co., 221 NLRB 999 (1975), the Board expanded Section 7 by finding that a solitary employee's actions regarding statutory Occupational Safety and Health Act ("OSHA") protection could be "concerted" based on the presumption that other employees had an interest in what the person was doing. This "presumed" or "constructive concerted action" standard, however, was rejected by several courts of appeals. See, e.g., Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304 (4th Cir. 1980); Pelton Casteel, Inc. v. NLRB, 627 F.2d 23 (7th Cir. 1980); NLRB v. Dawson Cabinet Co., 566 F.2d 1079 (8th Cir. 1977); NLRB v. Bighorn Beverage, 614 F.2d 1238 (9th Cir. 1980).

The Board, subsequently overruled Alleluia, holding that "[a] Board finding that a particular form of individual activity warrants group support is not a sufficient basis for labeling activity 'concerted' within the meaning of Section 7." Meyers Industries, 268 NLRB 493, 496 (1984)(Meyers I). The Board instead adopted a more restrictive interpretation of Section 7 and held that "to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." Id. Conversely, the Board held that "individual employee concern, even if openly manifested by several employees on an individual basis, is not sufficient evidence to prove concert of action." Id. at 498.

Two years later, the Board elaborated on what controls whether a single employee's conduct constitutes "concerted" activities engaged in for the "purpose of ...

mutual aid or protection." Meyers Industries, Inc., 281 NLRB 882, 887 (1986)(Meyers II). Initially, the Board held that a single employee can engage in concerted activity if he "bring[s] truly group complaints to the attention of management" and that this question is a "factual one based on the totality of the record evidence." Id.at 886-887. Relevant factors to consider include (a) whether other employees authorized or instructed the individual to speak for them, (b) whether other employees "were aware of and supported" the individual's presentation to management and (c) whether the individual previously discussed a "common ... complaint" with other employees who, in turn, "refrained from making [their] own ... complaint." Id. at 886. The Board further held that a single employee could engage in "concerted" activity by speaking with other co-workers for the purpose of "seek[ing] to initiate or to induce or to prepare for group action." Id. at 887. Finally, the Board rejected the notion that Section 7 protection might be triggered by "a single employee's invocation of a statute enacted for the protection of employees generally." Id.

Consistent with this standard, the Board later held that when an employee who raised a concern about favoritism was speaking "only for himself' and there was no evidence that coworkers shared his belief that favoritism existed, his complaint was "a personal gripe," not protected activity. Tampa Tribune, 346 NLRB 369, 371-72 (2006). Contrary to this long-held standard, the Board's majority in Fresh & Easy expanded the concepts of what is "concerted" activity and when a person is seeking "mutual aid or protection" for another. As stated by Member Miscimarra in his dissent in Fresh & Easy:

> My colleagues find, nonetheless, that concerted activities took place for 'mutual aid or protection' because Elias, on behalf of herself, wanted to complain about sex harassment. More generally, the Board majority

> announces a broad holding that 'an employee seeking the assistance or support of his or her coworkers in raising a sexual harassment complaint is acting for the purpose of mutual aid or protection.

Fresh & Easy Neighborhood Market, Inc., supra, 361 NLRB

Accordingly, the Board should overrule Fresh & Easy and reinstate the long-standing analysis set forth in Meyers I, Meyers II and Holling Press.

Second, under the facts of this case, Mr. Young's conduct relative to the February 8, 2017, and February 10, 2017, emails did not constitute "concerted" activity and/or was not taken for the "mutual aid or protection" of his coworkers.

Specifically, as the ALJ pointed out, "Young testified that he forwarded the emails to the entire group because he was hoping other NSTs would support him, he felt he was being harassed and he feared discipline." ALJ Decision at p. 22 [lines 1-3]. In other words, Mr. Young was complaining that he felt he was being harassed and how he feared discipline. There is no evidence, however, that any of his coworkers felt they were being harassed or they feared discipline. Moreover, Mr. Young was hoping other NSTs would support him. There is no evidence, however, that Mr. Young attempted to discuss his concerns with other NSTs before sending the emails. Likewise, while Mr. Young testified he later discussed these issues with his coworkers in person and on the telephone, the ALJ found this testimony to be both inconsistent with the sworn testimony in his March 28, 2017, NLRB affidavit and not credible. ALJ Decision at p. 17 [lines 9-17].

In his response to Mr. Henegar's February 8, 2017, email, Mr. Young stated as follows:

> In light of the harassment intimidated and threats receive from MTSC I fell it is only prudent to have our conversations in a public forum. You are making for a very hostile work environment with these threats if this was a technical question as you stated it could only benefit the whole network as to proper procedures.

ALJ Decision at p. 22 [lines 8-12].

In his response to Mr. Watts' February 10, 2017, email, Mr. Young stated "Am I the only one being harassed by these emails you and Mr. Henegar keep sending me?" ALJ Decision at p. 22 [lines 21-22].

Again, Mr. Young is stating that he is being harassed, intimidated and threatened and he asked Mr. Watts if he is the only one being harassed. There is no evidence that any of his coworkers also felt harassed, intimidated or threatened. It is also undisputed that none of his coworkers responded to or joined in on his February 8, 2017, or February 10, 2017, email chains. Indeed, the only evidence proffered by General Counsel that Mr. Young's emails were anything more than "mere griping" over an individual grievance is a single email purportedly written by NST Joseph Jeske ["Jeske email'] that states "I supported your decision on an APPS ticket that Mr. Henegar was harassing you about."[1] The Jeske email, however, should be disregarded because (1) it constitutes non-admissible hearsay and (2) it cannot be conclusively connected to the issues raised in the February 8 or 10, 2017, email chains.

Initially, hearsay is any statement made out of court and offered in evidence to prove the truth of the matter asserted. F.R.E. 801(c). Hearsay is not admissible except as provided otherwise by federal statute, the Federal Rules of Evidence, or other rules

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[1] The ALJ presumably referenced the Jeske email when she stated, "[l]ater, another NST joined in Young's frustrations and told Young that Henegar's treatment amounted to harassment." ALJ Decision at p. 22 [lines 36-37].

prescribed by the Supreme Court. F.R.E. 802. Here, General Counsel offers the Jeske email to prove the truth of the matter asserted – i.e., that Mr. Jeske supported Mr. Young's concerns that he was being harassed by Mr. Henegar. General Counsel, however, could have but did not call Mr. Jeske to testify at hearing. Furthermore, General Counsel produced no testimony or evidence to establish that Mr. Jeske's email should be admitted through any of the hearsay exceptions. The Jeske email was likewise not properly authenticated or identified. F.R.E. 901.

General Counsel argued at hearing to admit the Jeske email because "Mr. Young was in that email chain, he's a fellow employee, this all goes to the nature of the concerted activity involved in this case." Tr., p. 61. However, that argument must fail in the same way it is hearsay when a witness testifies that another person, who is not present to testify, verbally told him something. That the statement in question is a written email does not alter the hearsay analysis. Finally, to the extent General Counsel may claim the Jeske email should be admitted because it qualifies as a business record, that argument is not supported by the NLRB or the courts. For example, the Fourth Circuit recently held as follows:

> While properly authenticated e-mails may be admitted into evidence under the business records exception, it would be insufficient to survive a hearsay challenge simply to say that since a business keeps and receives e-mails, then *ergo* all those e-mails are business records falling within the ambit of Rule 803(6)(B). An e-mail created within a business entity does not, for that reason alone, satisfy the business records exception of the hearsay rule. Morisseau v. DLA Piper, 532 F.Supp.2d 595, 621 n. 163 (S.D.N.Y.2008). The district court's observation that the e-mails were kept as a 'regular operation of the business' is simply insufficient on that basis alone to establish a foundation for admission under Rule 803(6)(B).

United States v. Cone, 714 F.3d 197, 219-20 (4th Cir. 2013).

Secondarily, without Mr. Jeske's testimony, one cannot determine solely from the email precisely what he was supporting. While the email states that Mr. Jeske supported Mr. Young's "decision on an APPS ticket that Mr. Henegar was harassing you about," it does not identify what decision or what APPS ticket was at issue. There is no specific reference to the February 8, 2017, ticket or the related email chain between Mr. Henegar and Mr. Young. Moreover, this email is attached to an entirely different email chain relating to training opportunities.[2]

Accordingly, the ALJ erred by admitting the Jeske email into evidence and/or by relying on it to establish that Mr. Young's coworkers supported his feelings of harassment or fears of discipline. Tr. (pp. 51-62).

To the extent the Board decides to apply a new standard – i.e., neither the standard set forth in Meyers I, Meyers II and Bolling Press nor the standard set forth in Fresh & Easy – Respondent respectfully urges the Board to remand the matter back to the ALJ for further consideration.

2. The ALJ erred when she relied upon Purple Communications to conclude that Mr. Young could use the Postal Service's email system to engage in concerted protected activity

The ALJ's ruling is set forth at pages 23 [lines 26-47], 24 [lines 1-20], 25 [lines 13-45] and footnote 23, of the decision.

After quoting extensively from Purple Communications, Inc., 361 NLRB 1050 (2014), the ALJ concluded that "email has become a critical means of communication, about both work-related and other issues, in a wide range of employment settings" and

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[2] That the Jeske email is related to the February 8, 2017, email chain between Mr. Henegar and Mr. Young is also inconsistent with Mr. Young's sworn testimony in his March 28, 2017, NLRB affidavit where he stated that "none of these employees responded to my emails." Tr. (pp. 160-61).

that Mr. Young had the right to use the Postal Service's email system to engage in concerted protected activity. The ALJ further chose not to address Respondent's argument that Purple Communications is "unworkable, both generally and relative to the facts of this case, and should not be applied" and should be overturned. Having preserved this argument, Respondent now respectfully asks the Board to overturn Purple Communications and to return to the standard previously enunciated by the Board in Register Guard, 351 N.L.R.B. 1110 (2007) or to articulate a new standard.

Specifically, the Board misread the Supreme Court's decision in Republic Aviation v. NLRB, 324 U.S. 793 (1945), in which an employer banned in-person solicitation on its premises. Id. at 795. The case therefore presented a conflict between the employer's property rights and the employees' statutory rights and the Court recognized that these rights are often in tension, and that neither right is absolute. Id. at 797-98. The Court held that the Board's role is to strike a balance between the two, showing due respect for one without unduly burdening the other. Id. See also NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956) ("Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other."). Under the facts of Republic Aviation, the Court found that the employer's rule effectively obliterated the employees' statutory rights and, therefore, that the employer's rule must give way. Id. at 801, n. 6, and 805.

In the following decades, however, the Board and the courts recognized limits to the holding in Republic Aviation. For example, the decision did not give employees an absolute right for in-person solicitation -- employers could restrict solicitation in areas

where it had a legitimate business interest to do so. Beth Isreal Hosp. v. NLRB, 437 U.S. 483, 506 (1978) (noting that a hospital could forbid solicitation in certain areas, such as operating rooms, patients' rooms, and patient lounges). What employers could not do is restrict solicitation to such a degree that employees had no remaining avenue to discuss protected activity. Register Guard, 351 N.L.R.B. at 1115 ("Republic Aviation requires the employer to yield its property interests to the extent necessary to ensure that employees will not be 'entirely deprived' of their ability to engage in Section 7 communications in the workplace on their own time"); Stoddard Quick Mfg. Co., 138 N.L.R.B. 615, 621 (1962) ("Thus, in conformity with the Supreme Court's mandate in Babcock & Wilcox, the limitation on the employer's property right in each situation is imposed only to the extent that it is necessary for the maintenance of the employees' organizational right.").

The Board also recognized a difference between in-person solicitation and written solicitation. The Board held, for example, that an employer may properly forbid pamphleteering on its workroom floors. Stoddard, supra,138 NLRB at 621. It reasoned that pamphleteering poses a heavier burden on the employer's property rights, as stray pamphlets may create litter and pose a safety hazard and a rule against pamphleteering poses a lighter burden on the employees' statutory rights, as written literature can be distributed and consumed outside the workplace much more easily than oral communication. Id. at 619-20.

Finally, the Board recognized that Republic Aviation gave employees no right to co-opt an employer's property or equipment. Register Guard, supra, 351 N.L.R.B. at 1114 (noting that "the Board has consistently held that there is 'no statutory right . . . to

use an employer's equipment or media,' as long as the restrictions are nondiscriminatory" (quoting Mid-Mountain Foods, 332 N.L.R.B. 229, 230 (2000)). In a series of cases, the Board found that employers could not be coerced into surrendering their bulletin boards, public-address systems, copy machines, telephones, and – finally – their e-mail systems. See, respectively, Eaton Techs., 322 N.L.R.B. 848, 853 (1997); Heath Co., 196 N.L.R.B. 134 (1972); Champion Int'l Corp., 303 N.L.R.B. 102, 109 (1991); Churchill's Supermarkets, 285 N.L.R.B. 138, 155 (1987); and Register Guard, 351 N.L.R.B. at 1114. The Board explained that what Republic Aviation requires is balancing, not a complete sacrifice of property rights:

> What the employees seek here is use of the Respondent's communications equipment to engage in additional forms of communication beyond those that Republic Aviation found must be permitted. Yet, "Section 7 of the Act protects organizational rights . . . rather than particular means by which employees may seek to communicate."

Id. at 1115 (quoting Guardian Indus. Corp. v. NLRB, 29 F.3d 317, 318 (7th Cir. 1995)).

Nevertheless, despite the plain language of the Supreme Court's opinion and nearly 80 years of unbroken precedent, the Purple Communications majority discarded these limits. It instead held that Republic Aviation gave employees the right to convert an employer's e-mail system to their own purposes – regardless of whether the employer's rules were discriminatory or whether the employees had other ways to communicate. 361 N.L.R.B. No. 126, slip op. at 1. In so doing, the majority badly misread Republic Aviation. The Court's decision explicitly requires the Board to balance statutory rights against property rights. 324 U.S. at 79. But the majority engaged in no

such balancing and, instead, elevated statutory rights over property rights without considering the true burdens to either.

For example, the majority failed to consider the financial burdens additional e-mail traffic will place on an employer. Additional e-mail traffic is not, as the majority assumed, free. Even if one discounts the employer's initial capital investment in an e-mail system, increased volume imposes additional marginal costs. "Actiance, Osterman Study Reveals True Cost of On-Premises Enterprise Vault Archive Solution," Markets Insider (Sept. 28, 2017), http://markets.businessinsider.com/news/stocks/Actiance-Osterman-Study-Reveals-True-Costs-of-On-Premise-Enterprise-Vault-Archive-Solution-723000 (noting that companies spend roughly $8,950 per terrabite of archived e-mails each year, with 35 gigabites added for each e-mail user). To begin, employers must pay for additional server space, must pay archival costs, and must pay for data retention. While one or two additional e-mails may add little to those costs, e-mail by its nature continues to accumulate, year after year. In the aggregate, additional costs are inevitable. Id. (noting the "common practice" among employers is to keep "everything forever—including data from departed employees").

Direct monetary costs aside, increased e-mail traffic also poses a cost in employees' attention and time. Much like the pamphlets in Stoddard Quick, unwanted e-mail can clutter an employee's inbox and distract from business-related tasks. See, e.g., CAN-SPAM Act of 2003, 15 U.S.C. § 7701(a)(4)(recognizing that "the receipt of a large number of unwanted messages ... decreases the convenience of electronic mail and creates a risk that wanted electronic messages, both commercial and noncommercial, will be lost, overlooked, or discarded amidst the larger volume of

unwanted messages, thus reducing the reliability and usefulness of electronic mail to the recipient"). In other words, e-mail solicitation creates digital litter. *Cf.* Stoddard Quick, 138 N.L.R.B. at 621 (observing that the distribution of literature placed a greater burden on the employer's property rights because of its potential to cause litter and undermine productivity).[3]

The majority also overstated the burdens that neutral e-mail rules place on employees' rights. Focusing on e-mail's centrality to the modern workplace, the majority concluded that employees *need* to use e-mail to effectively communicate with one another. Id. at 4-5. But that conclusion was remarkably anachronistic. Today, American workers have more ways to communicate than ever before. Id. at 23 (Miscimarra, dissenting)(noting the ubiquity of electronic forms of communication, like web-based mail and social media), 40–41 (Johnson, dissenting) (same). They have access to free web-based e-mail accounts, myriad forms of social media, and smart phones. Id. In fact, more than three-fourths of workers now own a smart phone, and nearly as many use social media. See, Aaron Smith, "Record Number of Americans Now Own Smartphones, Have Home Broadband," Pew Research Center (Jan. 12,

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[3] E-mail traffic about Section 7 activity also poses administrative burdens. The majority's rule requires employers to open their e-mail systems for discussion of protected topics. Purple Communications, supra, 361 N.L.R.B. No. 126 at 1. Yet that requirement fits uneasily with other Board doctrines, such as the rule against unlawful surveillance. Id. at 20 (Miscimarra, dissenting) (citing Essex Int'l, Inc., 211 N.L.R.B. 749, 750 (1974)). As the Purple Communications majority itself recognized, employers have a legitimate business need to monitor their employees' e-mails. Id. at 20. Employers must ensure that workers comply with business-related policies, protect sensitive information, and don't use employer resources for illegal or tortious activities. Id. See also Register Guard, 351 N.L.R.B. at 1114 ("The General Counsel concedes that the Respondent has a legitimate interest in maintaining the efficient operation of its e-mail system, and that employers who have invested in an e-mail system have valid concerns about such issues as preserving server space, protecting against computer viruses and disseminating confidential information, and avoiding company liability for employees' inappropriate e-mails."). But under the majority's rule, ordinary business e-mails will inevitably mix with messages about protected activity. An employer, therefore, monitors business e-mail at its own peril. Purple Communications, 361 N.L.R.B. No. 126, slip op. at 20.

2017), http://www.pewresearch.org/fact-tank/2017/01/12/evolution-of-technology/; "Social Media Fact Sheet," Pew Research Center (Jan. 12, 2017), http://www.pewinternet.org/fact-sheet/social-media/ (noting that seven in ten Americans now use social media to "connect with one another, engage with news content, share information[,] and entertain themselves"). In other words, they simply don't need their employers' e-mail systems to communicate.

They can, and already do, communicate through a variety of other tools. Purple Communications, 361 N.L.R.B. No. 126, slip op. at 18 (noting that "employees now have more opportunities to conduct concerted activities relating to their employment than at any other time in human history"). Indeed, in this case, one of the NSTs established a Facebook page in January 2017 – prior to the February 8 and 10, 2017, emails Mr. Young sent to all NSTs – which is accessible to all NSTs, but not management, so that they can discuss issues involving the contract and working conditions – the very type of communication the Act seeks to protect. Tr. (pp. 180, 184-85); GC Ex. 27.

The majority, however, ignored these tools. It instead set out to solve a problem that did not exist. It assumed that workers in the digital age can only communicate through their employers' e-mail systems, and so adopted a "presumption" that they must have access to those systems. Id. at 1, 6-8 (discussing the centrality of business e-mail in the modern workplace). But as then-Member Miscimarra wrote in dissent, such presumptions have frequently proven unworkable:

> Nobody will benefit when employees, employers, and unions realize they cannot determine which employer-based electronic communications are protected, which are not, when employer intervention is essential, and

> when it is prohibited as a matter of law. Not only is such confusion almost certain to result from the majority's decision, it is unnecessary and unwarranted.

Id. at 28.

The Board, however, need not accept such confusion as the status quo. It can and should recognize that Purple Communications is unworkable. It should overrule that decision and return to the rule articulated in Register Guard. There, the Board held that an employer may allow nonbusiness communications through its e-mail system, or it may not. Register Guard, supra, 351 NLRB at 1116. Either way, it must treat communications about protected topics at least as well as it does other non-work-related messages. Id. That rule is simple, administrable, and consistent with the decades of case law preceding the Board's misstep in Purple Communications.

Finally, while the ALJ did not address the Board's rule set forth in Register Guard, there is no evidence that the Postal Service or the MTSC treated communications about protected topics inconsistently from, or worse than, those that are not. Specifically, the ALJ referenced in her decision several nonbusiness email chains that management condoned. However, two of the email chains – i.e., the email chain initiated on January 25, 2017, regarding TMS training and the email chain initiated on March 15, 2017, regarding a reported offer of early retirement to postal employees – both involved protected communication and yet were not forbidden by MTSC management. ALJ Decision at pp. 6 [lines 15-41], 7 [lines 1-5] and 13 [lines 37-40]. As such, this dispels any finding that MTSC management treated non-protected communication better than protected communication.

A third email chain – regarding who should pay for passports if required for NSTs to travel – is likewise not evidence that MTSC management treated non-protected communication better than protected communication. ALJ Decision at pp. 10 [lines 21-38] and 11 [lines 1-17]. While Mr. Fauchier instructed the NSTs to end the discussion after several days, he did not do so because the communication was protected, but because he had twice provided the NSTs with the Postal Service's position and he felt further discussion was no longer productive. Specifically, during the hearing, Mr. Fauchier explained why he instructed the NSTs to end the conversation as follows:

> To discontinue what I felt was rhetoric and possibly taking away from their everyday duties in their job position. You know, this subject's been answered, let's get off the email chain and get back to our job.
>
> ...
>
> While it was very valid comments and questions, I answered that twice and felt it was time we need to discontinue it.

Tr., pp. 294-295 (emphasis added).

The ALJ also referenced six other nonwork related email chains that were sent to all NSTs. ALJ Decision at pp. 13 (lines 31-36 and 42-47) and 14 (lines 1-23). One of the emails – i.e., a September 25, 2016, email with a link to an article in The Onion – was sent shortly after the MTSC was restructured in in July 2016, and before Mr. Henegar became the NSTs manager in December 2016. Four of the email chains – i.e., one email chain regarding Hurricane Harvey, two email chains regarding Hurricane Irma and one email chain regarding a cookout held by NSTs participating in the recovery effort after Hurricane Irma – were, in Mr. Watts' view, at least partially work-related and did not concern him. The last email chain – i.e., an August 21-23, email

chain regarding the total eclipse of the sun – was neither protected by the Act nor work-related. In total, these few email chains are not sufficient to establish that the MTSC treated non-protected emails better than protected emails.

To the extent the Board decides to apply a new rule – neither the rule set forth in Register Guard nor the rule set forth in Purple Communications – Respondent respectfully urges the Board to remand this matter back to the ALJ for further consideration.

3. Even if applying Purple Communications, the ALJ erred by allowing Mr. Young to use the Postal Service's email system during working time

The ALJ's ruling is set forth at pages 24 [lines 21-41] and 25 [lines 1-14].

Specifically, the ALJ concedes that Purple Communications only allows an employee to use the employer's email system during non-work time. ALJ Decision, p. 24 [lines 27-28]. The ALJ also concedes that Mr. Young sent the February 8 and 10, 2017, emails to his coworkers during work time. ALJ Decision, p. 24 [lines 36-37]. Nevertheless, the ALJ concluded that was permissible under Purple Communications because "[t]here is no evidence that Young's drafting and forwarding of his brief email messages interfered with his productivity" and "[t]here has been no showing that Young's forwarding of his emails to the MTSC distribution list diminished his productivity or that of his peers." ALJ Decision, p. 25 [lines 2-3, 11-13]. The ALJ then cited to two NLRB decisions that stand for the proposition that on-the-job work stoppages can remain protected activity. ALJ Decision, p. 25 [lines 3-7].

The ALJ, however, misses the point of Purple Communications and applies the wrong case law. The Board repeatedly states in its majority opinion that employee use

of an employer's email system is restricted to nonworking time. "[W]e decide today that employee use of email for statutorily protected communication *on nonworking time* must presumptively be permitted by employers who have chosen to give employees access to their email system." Purple Communications, supra, slip op. 1 (emphasis added). "The presumption that we apply is *expressly limited to nonworking time*." Id. slip op. 15 (emphasis added). "[A]s we have made clear, the presumption we establish is *limited to nonworking time*, for which there is, by definition, no expectation of employee productivity." Id. slip op. 15 fn 72 (emphasis added).

As the Board further states, "contrary to our dissenting colleagues' contentions, we do not do away with the fundamental concept that 'working time is for work.'" Id. This assurance was specifically made in response to then-Member Miscimarra's concern that "this new right will wreak havoc on the enforcement of one of the oldest, clearest, most easily applied of the Board's standards – 'working time is for work,'" Id. slip op. 19. Likewise, Member Johnson explained the same concern as follows:

> The Republic Aviation court, and every subsequent Board and court decision to apply it, recognized that the corollary to the presumptive Section 7 right in physical space was the principle of 'working time is for work.' The Board has long held that employers have a right to ensure that employees are productive during working time. In Republic Aviation, 324 U.S. at 803 fn 10, the Supreme Court affirmed the Board principle from Peyton Packing Co., 49 NLRB 828, 843 (1943), that '[t]he Act, of course, does not prevent an employer from making and enforcing reasonable rules covering conduct of employees on company time. Working time is for work ...' (Emphasis added). The wisdom of that decision is apparent.
>
> Employers exist to produce products and provide services, and no employer would last long in business if its only output was the exercise of Section 7 rights. In other words, no employer could survive if its only endeavor was a never-ending conversation with or among its employees about their terms and conditions of employment. Because the employer's right to exist and produce is the primary right without which Section 7

> rights would not long remain in the workplace, the Board and courts have sensibly drawn the bright line rule of 'working time is for work.' Here, the courts and Board have held that the employer's interests in production and discipline required some bright line to show where Section 7 rights to the employer's property normally stopped, and that principle was it. I compliment my colleagues in adhering, at least in the textual body of their opinion, to the long-established rule that working time is for work, and consequently finding that employers have legitimate interests in preventing Section 7 email from spiraling out of control. The majority makes clear at various points in their opinion that the new Section 7 balance only allows employee use of the employer's business email systems on nonworking time, as a technical matter. Yet despite the textual adherence to the 'working time' bright line, the majority still undermines this crucial part of Republic Aviation, by turning it into an exceedingly gray area. As a result, the new standard imposed by the majority will substantially undermine an employer's right to make certain that employees are working during scheduled worktime.
>
> Why? The technology of email does not respect the 'working time'/'break time' boundary. In this respect, email does not care when it is sent, received, reviewed, or composed. The sender of the email may not know whether the recipient is working, and the recipient of an email may not know that the email is not work-related. And, in either case, employees who wish to, can simply send, review, and respond to emails on their working time.

Id. slip op. 49.

Indeed, these are the very concerns that the Postal Service and MTSC management wished to avoid in the instant case. The Postal Service's Management Instruction EL-660-2009-10, for example, permits employees to make limited personal use of Postal Service equipment, including information technology, "provided such use does not ... [r]educe or otherwise affect the employee's productivity *during work hours*." ALJ Decision, p. 12 [lines 20-23]. Similarly, Mr. Henegar's January 25, 2017, instruction states that ...

> Emailing all employees in the network with non-work related items, *during work hours*, is an inefficient use of resources. This platform was created

> to provide you and your peers the opportunity to share each other's knowledge and skills to better perform your job. Please ensure that, *while you are on working time*, your efforts stay affixed to that goal. This is an expectation, and failure to adhere to this expectation can lead to corrective action.

ALJ Decision, pp. 12 [lines 41-45] and 13 [lines 1-2].

At hearing, Mr. Henegar explained his rationale for prohibiting employees from sending non-business emails while they are working as follows:

> Well, if they're working, they are to be productively engaged. They're to do the work that they're being assigned, they're being compensated to do a job. They, that job that they were hired that they should be actively engaged in, that work that we assign them is what should be taking up their time.

Tr. (p. 212).

Within the February 8, 2017, email chain, Mr. Henegar again specifically instructed Mr. Young to "[p]lease refrain from this activity *during your working hours* that is not directly related to supporting a log." Tr. (pp. 202-03); GC Ex. 21 (p. 2); R Ex. 2 (p. 1).

Yet, Mr. Young copied all the NSTs on his February 8, 2017, emails to Mr. Henegar and his February 10, 2017, emails to Mr. Watts. And he did so while he was undisputedly on work time. As such, Mr. Young's use of the Postal Service's email system on February 8 and 10, 2017, copying the other NSTs, was not presumptively permitted under Purple Communication, even if he was engaging in protected activity, and could appropriately be considered for disciplinary action.

The ALJ also applied the wrong law. Under most circumstances, employees lose protection of the Act if they engage in a sit-down strike or intermittent strike. See, e.g.,

NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939) and Yale University, 330 N.L.R.B. 246 (1999), respectively. The two cases cited by the ALJ, however, stand for the proposition that employees do not necessarily lose protection of the Act when they briefly stop working and are not engaged in a sit-down strike or an intermittent strike. LaGuardia Associates, LLP, 357 N.L.R.B. 1097, 1102 (2011), citing Los Angeles Airport Hilton Hotel & Towers, 354 N.L.R.B. 202 fn 8 (2009). It should be noted that, in the latter case, the Board found relevant to its inquiry the fact that the employees were unrepresented. That fact does not exist here.

Regardless, the instant case does not involve a brief work stoppage or strike. Rather, it involves an employee using the employer's email system to engage in protected activity. That issue is presently governed by Purple Communications since, prior thereto, employees had no such right. Neither the majority nor the dissenters in Purple Communications in any way addressed whether employees can briefly stop working while using the employer's email system to engage in protected activity. In fact, as stated above, both the majority and the dissenters made it clear that employees may use the employer's email system to engage in protected activity only "during nonworking time." As such, these cases are irrelevant to the analysis here.

Instead, the ALJ could have attempted to apply the "special circumstances" exception articulated in Purple Communications. That is, an employer can forbid nonbusiness e-mails if it proves that special circumstances make such a rule "necessary to maintain production or discipline." However, that analysis does not change the result in this case. Initially, the majority in Purple Communications did not explain what such a "special circumstance" might be, or how the employer might prove

that it exists. Id. at 28 (Miscimarra, dissenting) (predicting that the majority's standard would sew confusion among employers and employees alike). The majority therefore left employers in the dark about when they can limit their e-mail systems to business use only – or indeed, whether they can ever do so. Id. In fact, in the nearly four years since the Board decided Purple Communications, it has yet to find any qualifying "special circumstances." See, e.g., UMPC, 362 N.L.R.B. No. 191 (2015), slip op. at 4–5 (refusing to find special circumstances to justify a business-use e-mail policy, even in a hospital setting).

In this case, the 100 NSTs are domiciled in 76 separate facilities, providing technical assistance to postal management 24 hours a day, 365 day a year. There are some NSTs on duty at all times. ALJ Decision, p. 3 [lines 24-26]. NSTs take lunches or breaks at different times, at their discretion, and are not aware when other NSTs are working or are at lunch or on break. ALJ Decision, p. 3 [lines 26-28]. Moreover, the NSTs primary means of communication about work-related matters is via the employer's email system. ALJ Decision, p. 3 [lines 42-43]. Therefore, allowing NSTs to copy the entire MTSC network with any emails that are not work-related inherently clutters their email boxes and distracts them from their assigned job duties.

If there are or will ever be facts to support the "special circumstances" exception, thereby justifying an employer to ban all nonbusiness emails, those facts exist in this case. As set forth, above, allowing NSTs to copy the entire MTSC on nonbusiness emails is inherently distracting to the other NSTs and will impede production. Therefore, a ban is "necessary to maintain production." Moreover, one NST sent Mr. Henegar an email on March 24, 2017, stating that the NSTs have received "serious

Spam" from Mr. Young over the past few months and that "the communication highway needs to stay open, but not with Spam like this." ALJ Decision, p. 13 [lines 23-27].

4. The ALJ erred when she held that Mr. Henegar violated the Act when he directed Mr. Young to limit his replies to managers on January 10, 2017

The ALJ's ruling is set forth at page 26 [lines 1-46] and 27 [lines 1-8].

Respondent concedes that Mr. Young was engaged in concerted protected activity when emailing Mr. Henegar on January 9 and 10, 2017. However, to the extent the Board rules that Purple Communications should be overruled or that Purple Communications does not allow employees to engage in concerted protected activity during work hours, then the ALJ's ruling here constitutes error and should be reversed or remanded back to the ALJ for further consideration.

5. The ALJ erred when she held that Mr. Fauchier violated the Act by instructing employees to stop email discussions concerning passports and REAL ID

The ALJ's ruling is set forth at page 27 [lines 10-32] of the ALJ's decision.

Respondent concedes that Mr. Young was engaged in concerted protected activity when he and other NSTs emailed Mr. Fauchier about the need for passports when traveling via airplane and who should pay for the passports. However, to the extent the Board rules that Purple Communications should be overruled or that Purple Communications does not allow employees to engage in concerted protected activity during work hours, then the ALJ's ruling here constitutes error and should be reversed or remanded back to the ALJ for further consideration.

Furthermore, as discussed in more detail, infra, Mr. Fauchier did not end the discussion because of its protected status, but rather because he had already answered the employees' question twice and felt further discussion was no longer productive. Under those circumstances, the employees did not feel threatened or coerced and Mr. Fauchier's remarks did not objectively tend to interfere with the free exercise of employee rights.

6. The ALJ erred when she held that Mr. Henegar instructed Mr. Young to stop disseminating work instructions or performance expectations on March 15, 2017

The ALJ's ruling is set forth at pages 27 [lines 34-47] and 28 [lines 1-17] of the ALJ's decision.

Respondent concedes that Mr. Young was engaged in concerted protected activity when emailing Mr. Henegar on March 15, 2017. However, to the extent the Board rules that Purple Communications should be overruled or that Purple Communications does not allow employees to engage in concerted protected activity during work hours, then the ALJ's ruling here constitutes error and should be reversed or remanded back to the ALJ for further consideration.

7. The ALJ erred when she held that Mr. Young's suspension violated the Act

The ALJ's ruling is set forth at pages 28 [lines 19-43] and 29 [lines 1-41] of the ALJ's decision.

Mr. Young's suspension was based on his failure to follow instructions in connection with his email exchanges with Mr. Henegar on February 8, 2017, and his email exchanges with Mr. Watts on February 10, 2017. However, to the extent the Board rules that Fresh & Easy should be overruled and that Mr. Young was not engaged in concerted protected activity under Holling Press or another standard, the ALJ's ruling that the consequent suspension violated the Act constitutes error and should be reversed or remanded back to the ALJ for further consideration. Alternatively, to the extent that Purple Communications should be overruled or that Purple Communications does not allow employees to engage in concerted protected activity during work hours, then the ALJ's ruling here constitutes error and should be reversed or remanded back to the ALJ for further consideration.

CONCLUSION

Based on the foregoing, Respondent respectfully submits that the instant complaint be dismissed in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this this 23rd day of October, I served Respondent's foregoing Post-Hearing Brief as follows:

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